

EXHIBIT GG

L. Smith, esq

999 B. St

#2600

LYNCH ICHIDA THOMPSON KIM & HIROTA

TIMOTHY J. HOGAN 5312-0
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MAR 19 2003

CLERK, U.S. DISTRICT COURT
DISTRICT OF HAWAII

Attorney for Plaintiff
 WAYNE BERRY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WAYNE BERRY

Plaintiff,

FLEMING COMPANIES, INC., aka
 FLEMING FOODS, INC., aka
 FLEMING, HAWAIIAN
 EXPRESS SERVICE, INC,
 DOE INDIVIDUALS 1-50 AND
 DOE PARTNERSHIPS,
 CORPORATIONS AND OTHER
 ENTITIES 1-20,

Defendants.

Civ.No.CV 01 00446 SPK LEK
 (Copyright)

NOTICE OF MOTION;
 PLAINTIFF WAYNE BERRY'S
 MOTION FOR ENTRY OF
 PERMANENT INJUNCTION;
 MEMORANDUM IN SUPPORT
 OF MOTION; DECLARATION OF
 TIMOTHY J. HOGAN; EXHIBIT
 "A"; CERTIFICATE OF SERVICE

HEARING:

DATE: March 28, 2003TIME: 10:00 a.m.JUDGE: Samuel King

TRIAL:


February 24, 2003

NOTICE OF MOTION

TO: LEX R. SMITH, ESQ.
Kobayashi Sugita & Goda
First Hawaiian Center
999 Bishop Street, Suite 2600
Honolulu, Hawaii 96813
Attorney for Fleming Companies, Inc.

NOTICE IS HEREBY GIVEN that Plaintiff Wayne Berry's Motion for Entry of Permanent Injunction shall come on for hearing before the Honorable Samuel King, United States District Judge of the above-entitled Court, in his courtroom in the United States District Court, 300 Ala Moana Boulevard, Honolulu, Hawaii 96813 on Friday, March 28, 2003 at 10:00 a.m., or as soon thereafter as counsel can be heard.

Dated: Honolulu, Hawaii, March 19, 2003


TIMOTHY J. HOGAN
Attorney for Plaintiff
WAYNE BERRY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WAYNE BERRY	)	Civ.No.CV 01 00446 SPK LEK
	)	(Copyright)
Plaintiff,)	
)	
FLEMING COMPANIES, INC., aka	)	PLAINTIFF WAYNE BERRY'S
FLEMING FOODS, INC., aka	)	MOTION FOR ENTRY OF
FLEMING, HAWAIIAN	)	PERMANENT INJUNCTION
EXPRESS SERVICE, INC,)	
DOE INDIVIDUALS 1-50 AND)	
DOE PARTNERSHIPS,)	
CORPORATIONS AND OTHER)	
ENTITIES 1-20,)	
)	
Defendants.)	
)	

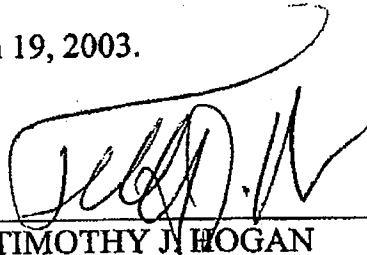
PLAINTIFF WAYNE BERRY'S MOTION FOR
ENTRY OF PERMANENT INJUNCTION

COMES NOW, Plaintiff Wayne Berry ("Plaintiff"), by and through his undersigned counsel and hereby moves this Honorable Court for entry of a permanent injunction prohibiting the use of the **Freight Control System** that was the subject of the jury verdict filed herein on March 6, 2003. Plaintiff seeks an order to restrain further acts of infringement and use of his software and the turn over of all infringing copies of the software. Plaintiff brings this Motion on the grounds that evidence has been adduced that Fleming has made material changes to Plaintiff's software. The Jury found those changes constituted willful

infringement. Plaintiff believes Fleming is using infringing copies of Plaintiff's software in its daily operations that constitutes unlicensed infringement. Further, Fleming and the Discovery Master should be required to deliver to Plaintiff all copies of the infringing software and be ordered to cease any development of any and all additional derivatives. Finally, the injunction should be broad in scope to prohibit Fleming, its subsidiaries, officers, directors, and agents for engaging in any future acts of infringement.

This motion is brought pursuant to The Copyright Act, 17 U.S.C. § 502, LR 7 and is supported by the attached Memorandum in Support, Declaration of Counsel.

Dated: Honolulu, Hawaii, March 19, 2003.



TIMOTHY J. HOGAN
Attorney for Plaintiff
Wayne Berry

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

WAYNE BERRY	)	Civ.No.CV 01 00446 SPK LEK
	)	(Copyright)
Plaintiff,)	
	)	MEMORANDUM IN SUPPORT
FLEMING COMPANIES, INC., aka	)	OF MOTION
FLEMING FOODS, INC., aka)	
FLEMING, HAWAIIAN)	
EXPRESS SERVICE, INC,)	
DOE INDIVIDUALS 1-50 AND)	
DOE PARTNERSHIPS,)	
CORPORATIONS AND OTHER)	
ENTITIES 1-20,)	
)	
Defendants.)	

MEMORANDUM IN SUPPORT OF MOTION

A. Mr. Berry in Legally Entitled to A Permanent Injunction.

Sec. 502. - Remedies for infringement: Injunctions

1. (a)

Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

(b)

Any such injunction may be served anywhere in the United States on the person enjoined; it shall be operative throughout the United States and shall be enforceable, by proceedings in contempt or otherwise, by any United States court having jurisdiction of that person. The clerk of the court granting the injunction shall, when requested by any

other court in which enforcement of the injunction is sought, transmit promptly to the other court a certified copy of all the papers in the case on file in such clerk's office

A moving party is entitled to an injunction if it demonstrates either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) that there exist serious questions regarding the merits and the balance of hardships tips sharply in its favor. *Apple Computer, Inc. v. Formula International, Inc.*, 725 F.2d 521, 523 (9th Cir. 1984). This formula does not involve two distinct tests, but represent "the opposite ends of a continuum in which the required showing of harm varies inversely with the required showing of meritoriousness." *Rodeo Collection Ltd. v. West Seventh*, 812 F.2d 1215 (9th Cir. 1987).

As demonstrated by the Jury Verdict attached to the Hogan Declaration as Exhibit "A," Mr. Berry has already prevailed on the merits as to the Freight Control System which is the heart and soul of the logistics system. Irreparable harm is presumed in copyright infringement cases.

A. Mr. Berry Owns a Valid Copyright.

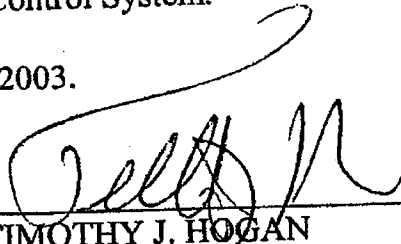
The Jury Verdict demonstrates that Mr. Berry owns the copyright and that Fleming is a wilful infringer. Hogan Dec. at Exhibit "A."

B. The Possibility of Irreparable Harm.

It is well settled that, "[i]n copyright infringement actions, there is a presumption of irreparable harm and thus the plaintiff need only show a reasonable likelihood of success on its copyright infringement claim to support the district court's preliminary injunction." *Cadence Design Systems, Inc. v. Avant! Corp.*, 125 F.3d 824, 827 (9th Cir. 1997). "A finding of likelihood of success on the merits automatically triggers a preliminary injunction." *Id.* at 827-828. If plaintiff is able to demonstrate a prima facie case of copyright infringement, irreparable injury will be presumed and a preliminary injunction will issue. *Wainright Securities, Inc. v Wall Street Transcript Corp.*, 558 F2d 91, 94 (2d Cir. 1977); *Universal City Studios, Inc. v Film Ventures Int., Inc.*, 214 USPQ 865, 868 (C.D. Cal. 1982).

Plaintiff has prevailed on the merits as to the Freight Control System. Plaintiff is therefore entitled to an order for entry of a permanent injunction against Defendant, its subsidiaries, employees and agents, preventing them from using and/or infringing on Plaintiff's Freight Control System.

DATED: Honolulu, Hawaii, March 19, 2003.


TIMOTHY J. HOGAN
Attorney for Plaintiff
WAYNE BERRY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

WAYNE BERRY	)	Civ.No.CV 01 00446 SPK LEK
	)	(Copyright)
Plaintiff,)	
)	
FLEMING COMPANIES, INC., aka	)	DECLARATION OF TIMOTHY
FLEMING FOODS, INC., aka	)	J. HOGAN; EXHIBIT "A"
FLEMING, HAWAIIAN)	
EXPRESS SERVICE, INC,)	
DOE INDIVIDUALS 1-50 AND)	
DOE PARTNERSHIPS,)	
CORPORATIONS AND OTHER)	
ENTITIES 1-20,)	
)	
Defendants.)	

DECLARATION OF TIMOTHY J. HOGAN

I, TIMOTHY J. HOGAN, am an attorney licensed to practice before all the courts of the State of Hawaii and I make this declaration under penalty of perjury. All the statements herein are true and correct to the best of my knowledge, information and belief. If called upon to testify regarding the matters stated herein, I am competent and willing and able to testify.

2. Attached hereto as Exhibit "A" is a true and correct copy of the Jury Verdict filed herein on March 6, 2003.

3. The Plaintiff seeks the entry of a permanent injunction against Defendants as to the Freight Control System to prevent further use and acts of

infringement.

I hereby declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Executed at Honolulu, Hawai'i, March 19, 2003.


TIMOTHY J. HOGAN

MAR-06-2003 15:15

ORIGINAL

U.S. COURTS HAWAII

808 541 1303 P. 02/06
DISTRICT OF HAWAII

MAR 6 2002

at 3 o'clock and 40 min
WALTER A. Y. H. CHINN/CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WAYNE BERRY,

Plaintiff,

vs.

FLEMING COMPANIES, INC., aka
FLEMING FOODS, INC., aka
FLEMING,
DOE INDIVIDUALS 1-50 AND
DOE PARTNERSHIPS,
CORPORATIONS AND OTHER
ENTITIES 1-20,

Defendants.

) CIVIL NO. 01 00446 SPK LEK

) SPECIAL VERDICT FORM

SPECIAL VERDICT FORM

A. FREIGHT CONTROL SYSTEM SOFTWARE

1. Has Plaintiff Wayne Berry proven by a preponderance of the evidence that he is the owner of the copyright to the Freight Control software attached to Exhibit 221?

Yes ☒

No ☐

If "YES" go to next question.
If "NO", skip to section B.

EXHIBIT "A"

MAR-06-2003 15:15

U.S. COURTS HAWAII

BOB 541 1303 P.03/06

2. Did Fleming Companies, Inc. prove by a preponderance of the evidence that it has a valid license for the use of the Freight Control software.

Yes ☒

No ☐

If "YES" go to next question.

If "NO" go to question 4.

3. Did Wayne Berry prove by a preponderance of the evidence that Fleming made unauthorized changes to the Freight Control software.

Yes ☒

No ☐

If "NO" skip to section B.

If "YES" go to next question.

4. Was the infringement of the Freight Control software copyright willful?

Yes ☒

No ☐

Go to the next question.

5. What amount of damages is Wayne Berry entitled to for the infringement of Freight Control System software?

\$99,250.00

MAR-06-2003 15:15

U.S. COURTS HAWAII

B08 541.1383 P.04/06

B. CRYSTAL REPORTS SOFTWARE

1. Has Plaintiff Wayne Berry proven by a preponderance of the evidence that he is the owner of the copyright to the Crystal Reports software attached to Exhibit 222?

Yes ☒

No ☐

If "NO", skip to section C.
If "YES" go to next question.

2. Did Fleming Companies, Inc. prove by a preponderance of the evidence that it has a valid license for the use of the Crystal Reports software.

Yes ☒

No ☐

If "YES" go to next question.
If "NO" go to question 4.

3. Did Wayne Berry prove by a preponderance of the evidence that Fleming made unauthorized changes to the Crystal Reports software.

Yes ☐

No ☒

If "NO" skip to section C.
If "YES" go to next question.

4. Was the infringement of the Crystal Reports software copyright willful?

Yes ☐

No ☐

Go to the next question.

MAR-06-2008 15:15

U.S. COURTS HAWAII

808 541 1303 P.05/06

5. What amount of damages is Wayne Berry entitled to for the infringement of Crystal Reports software?
-

C. FLEMINGPO.EXE SOFTWARE

1. Has Plaintiff Wayne Berry proven by a preponderance of the evidence that he is the owner of the copyright to the FlemingPO.exe software attached to Exhibit 223?

Yes ☒

No ☐

If "YES" go to next question.

If "NO", skip to the end.

2. Did Fleming Companies, Inc. prove by a preponderance of the evidence that it has a valid license for the use of the FlemingPO.exe software.

Yes ☒

No ☐

If "YES" go to next question.

If "NO" go to question 4.

3. Did Wayne Berry prove by a preponderance of the evidence that Fleming made unauthorized changes to the FlemingPO.exe software.

Yes ☐

No ☒

If "NO" skip to the end.

If "YES" go to next question.

MAR-06-2003 15:15

U.S. COURTS HAWAII

808 541 1303 P.06/06

4. Was the infringement of the FlemingPO.exe software copyright willful?

Yes _____

No _____

Go to the next question.

5. What amount of damages is Wayne Berry entitled to for the infringement of FlemingPO.exe software?

Please sign and date this Special Verdict Form.

[Signature]
Jury Foreperson

[Signature]

[Signature]

[Signature]

[Signature]

Carol Ho Akemoto

[Signature]

[Signature]

[Signature]

Date

3/6/03

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

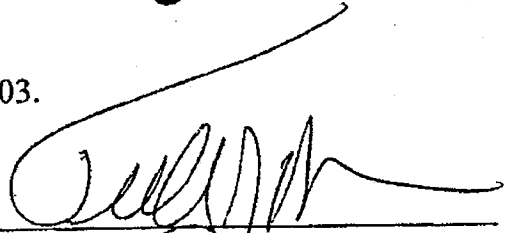
WAYNE BERRY	)	Civ.No.CV 01 00446 SPK LEK
	)	(Copyright)
Plaintiff,)	
	)	CERTIFICATE OF SERVICE
)	
vs.)	
)	
FLEMING COMPANIES, INC., aka)	
FLEMING FOODS, INC., aka)	
FLEMING, HAWAIIAN EXPRESS)	
SERVICE, INC.)	
DOE INDIVIDUALS 1-50 AND)	
DOE PARTNERSHIPS,)	
CORPORATIONS AND OTHER)	
ENTITIES 1-20,)	
Defendants.)	
)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing
document was duly served on the following party via hand delivery on March 19,
2003, addressed as follows:

LEX R. SMITH, ESQ.
Kobayashi Sugita & Goda
First Hawaiian Center
999 Bishop Street, Suite 2600
Honolulu, Hawaii 96813
Attorneys for Defendant
Fleming Companies, Inc.

Dated: Honolulu, Hawaii, March 19, 2003.



TIMOTHY J. HOGAN
Attorney for Plaintiff
Wayne Berry